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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. PERRY WRIGHT, Defendant and Appellant.	E069642 (Super.Ct.No. FWV17001837) OPINION

APPEAL from the Superior Court of San Bernardino County. Katrina West, Judge. Affirmed.

James M. Kehoe, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles Ragland, Scott C. Taylor and Craig H. Russell, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Perry Wright guilty of robbery. (Pen. Code, § 211.)[1] A jury found true the allegation that defendant personally used a deadly or dangerous weapon during the commission of the robbery. (§ 12022, subd. (b)(1).) The trial court found true the allegations that defendant suffered (1) a prior strike conviction (§ 1170.12, subds. (a)-(d)); (2) a prior serious felony conviction (§ 667, subd. (a)(1)); and (3) a prior conviction for which defendant served a prison term (§ 667.5, subd. (b)). The trial court sentenced defendant to prison for a term of 11 years.

Defendant contends the trial court erred by including the term "inherently dangerous" when instructing the jury about the weapon enhancement (§ 12022, subd. (b)(1)). The People concede the trial court erred, but assert the error was harmless. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

A. ROBBERY

A security guard at a grocery store in Rialto saw defendant place a toothbrush and a candy bar in his pocket. The security guard alerted the store management that defendant might be shoplifting. The store management told the security guard not to confront defendant. Defendant appeared "extremely agitated, and he was cursing in the store and just acting kind of crazy."

Andrew Herrera, a manager at the grocery store, saw defendant toward the back of the candy aisle. Herrera asked defendant if he needed help, and defendant said,

[1] All subsequent statutory references will be to the Penal Code unless otherwise indicated.

"No." Defendant walked to the front of the store. Tim Bougie, the store director, was at the front of the store near the exit. Defendant asked Bougie "if [he] had a fucking problem." Bougie asked defendant, " 'Do you have [store] merchandise in your pocket?' " Defendant said "he ha[d] a cigarette lighter and a knife in his pocket." Herrera approached and said, " 'I can see it sticking out of your pocket. It's right there. The toothbrush and the candy bar are sticking out of your pocket.' "

Defendant again said he had a cigarette lighter and a knife in his pocket. Defendant then removed the knife from his pocket. Herrera and Bougie "backed up" in order "to keep a safe distance." Bougie "was fairly close to the defendant when he pulled out the knife." Defendant said, " 'See. I got a fucking knife. What are you going to do? I'll show the fucking knife to the camera. See.' " Defendant then moved the knife in front of the security camera. Defendant waved the knife as if making the letter "S" with it.

Defendant waved the knife at Herrera and Bougie. Defendant did not lunge with the knife toward Herrera and Bougie. Herrera testified both that defendant did, and did not, swipe at him with the knife. Bougie saw defendant swipe at Bougie with the knife. Bougie believed that if he had been within one to two feet of defendant, then Bougie would have been cut by the knife.

Defendant repeatedly asked "[W]hat the 'F' they were going to do," and continued to say profanities. Defendant exited the store. Herrera and Bougie followed to see what direction defendant traveled. Herrera and Bougie were three to four feet behind defendant. Defendant walked away, but repeatedly turned around and pointed

the knife at Herrera and Bougie and yelled " 'Yeah. I have a knife. Look. I'll show it to the camera.' " Defendant threw the toothbrush and candy bar on the ground and walked toward the store's recycling center. Defendant dropped the knife on the ground, outside the store.

Bougie and Herrera did not tell the police that defendant pointed the knife at them. Bougie told police that defendant held the knife in the air. Defendant never touched Bougie or Herrera.

B. PROSECUTOR'S CLOSING ARGUMENT

During closing argument, the prosecutor argued, "And when he is asked for the merchandise back, he doesn't give it back. He pulls out a knife, and he swipes at these two victims. He holds it up in the air, holds it up, shows it to the camera, because honestly, ladies and gentlemen, what were they going to do?"

In regard to robbery, for the element of force or fear, the prosecutor argued, "So let's recap the evidence that supports the force or fear elements. So he took the knife out, right? And he specifically said, 'I got a knife. What are you going to do about it?' And he's combative and he's aggressive. And he's waving it in the air. And he's swiping it at Mr. Bougie and Mr. Herrera, just as both of them testified. [¶] And not only that, not only is he wielding this knife forcefully, they're scared. How do we know that? How do we know that they're scared? Well, they physically step back as soon as he pulls the knife out of his pocket and Mr. Bougie yells out loud to warn other people to step back because he has a knife. [¶] Okay. And then, after that, they keep a distance from him because they're scared because they don't want to get stabbed." The

prosecutor asserted, "[Defendant] knew exactly what he was doing when he pulled that knife out; what kind of effect it would have on them."

In regard to the deadly or dangerous weapon element of the enhancement, the prosecutor argued, "And along with that is the weapon allegation. Someone personally uses a deadly or dangerous weapon if he displays the weapon in a menacing manner. That's exactly what he did. Swiping it, waving it in the air in an S shape, trying to show it to the camera to intimidate everybody else. That's exactly what he did."

C. DEFENDANT'S CLOSING ARGUMENT

During closing argument, defense counsel asserted Bougie asked defendant what was in his pocket, so defendant removed the knife from his pocket. Defense counsel argued, "[Defendant] is not guilty because he pulled that knife out when he was asked what he had in his pocket." In regard to the force or fear element of robbery, defense counsel argued, "They didn't—he's apparently waving it around in such a threatening manner, they're right behind him. Literally within an arm's length if they thought he was going to stab them, they were in arm's length. What it looks like is they didn't think anything was going to come."

Additionally, defense counsel argued, "What is going through [defendant's] mind when he stopped? Okay. '. . . I'm going to be charged, maybe, with carrying [a] concealed weapon.' Why hasn't the district attorney charged that? I don't know. Is it carrying a concealed weapon? Looks like it."

Defense counsel urged the jury to "find [defendant] guilty of petty theft and acquit him of robbery." Defense counsel argued, "[Defendant] deserves to be held

accountable for what he did, which is a petty theft. Shamelessly taking actions. Maybe it was foolish, maybe it was a petty theft, maybe it was carrying a concealed weapon. It was a petty theft in this case. It was not a robbery."

D. JURY INSTRUCTION

The trial court instructed the jury with CALCRIM No. 3145. The instruction provided, "If you find the defendant guilty of the crime charged in Count 1, or of attempting to commit that crime, you must then decide whether the People have proved the additional allegation that the defendant personally used a deadly or dangerous weapon during the commission or attempted commission of that crime.

"A *deadly or dangerous* weapon is any object, instrument, or weapon that is inherently dangerous or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.

"In deciding whether an object is a deadly weapon, consider all the surrounding circumstances, including when and where the object was possessed, and where the person who possessed the object was going, and whether the object was changed from its standard form and any other evidence that indicates whether the object would be used for a dangerous, rather than a harmless, purpose.

"*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

"Someone *personally uses* a deadly or dangerous weapon if he or she intentionally does any of the following:

"1. Displays the weapon in a menacing manner;

"OR

"2. Hits someone with the weapon;

"The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved."

DISCUSSION

A. JURY INSTRUCTION

Defendant contends the trial court erred when instructing the jury about the weapon enhancement. In particular, defendant asserts the trial court erred by including the term "inherently dangerous." The People concede the trial court erred.

" 'The law imposes on a trial court the sua sponte duty to properly instruct the jury on the relevant law and, as such, requires the giving of a correct instruction.' " (*People v. Thiel* (2016) 5 Cal.App.5th 1201, 1208.) We apply the de novo standard of review. (*Ibid*.)

The law has created two categories of deadly or dangerous weapons: (1) those that are per se, as a matter of law, inherently deadly or dangerous; and (2) those that are deadly or dangerous under certain circumstances, depending upon the manner in which the weapon was used. (*People v. Brown* (2012) 210 Cal.App.4th 1, 6.) A knife is not, as a matter of law, an inherently deadly or dangerous weapon. (*People v. McCoy* (1944) 25 Cal.2d 177, 188.) A knife may be found to be a deadly or dangerous weapon "depending upon the manner in which it was used." (*Ibid.*)

The trial court instructed the jury as follows: "A deadly or dangerous weapon is any object, instrument, or weapon that is inherently dangerous or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury." (CALCRIM No. 3145.) The trial court erred when it gave the jury the option of finding the knife to be a deadly or dangerous weapon on the basis of the knife being an "inherently dangerous" weapon, because a knife, as a matter of law, is not an inherently dangerous weapon. The trial court should have only instructed the jury with the second option in the instruction: "A deadly [or dangerous] weapon is any object, instrument, or weapon that . . . is used in such a way that it is capable of causing and likely to cause death or great bodily injury" (CALCRIM No. 3145, italics omitted). (*People v. Stutelberg* (2018) 29 Cal.App.5th 314, 318 (*Stutelberg*) ["the jury in this case should not have been instructed on an 'inherently dangerous' weapon"]; see also *People v. Brown* (2012) 210 Cal.App.4th 1, 11 [the form jury instruction should be modified].) In sum, we conclude the trial court erred.

B. PREJUDICE

We examine whether the trial court's error was prejudicial. Because the trial court incorrectly instructed the jury on an element of the weapon enhancement, the error implicates defendant's right of due process in relation to the prosecution's burden of

proof. Therefore, we will examine whether the trial court's error was harmless beyond a reasonable doubt.[2] (*Stutelberg, supra,* 29 Cal.App.5th at p. 319.)

Section 12022, subdivision (b)(1), provides: "A person who personally uses a deadly or dangerous weapon in the commission of a felony or attempted felony shall be punished . . . ." " 'In order to find "true" a section 12022(b) allegation, a fact finder must conclude that, during the crime or attempted crime, the defendant himself or herself intentionally displayed in a menacing manner or struck someone with an instrument capable of inflicting great bodily injury or death.' " (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1197 abrogated on other grounds in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.)

We examine the issue of prejudice in relation to the instruction on the element of whether the knife was a weapon. A knife "is only ' "dangerous or deadly" ' when it is capable of being used in a ' "dangerous or deadly" ' manner and the evidence shows its possessor intended to use it as such." (*People v. Burton* (2006) 143 Cal.App.4th 447,

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[2] The Supreme Court has granted review in *People v. Aledamat* (2018) 20 Cal.App.5th 1149, review granted July 5, 2018, S248105. The case presents the following issue: If a jury is instructed on a legally correct theory and a legally incorrect theory, can the error of instructing with the legally incorrect theory be found harmless (1) if it can be concluded beyond a reasonable doubt that the jury based its finding on the legally valid theory, or (2) only if the record affirmatively demonstrates the jury rested its verdict on the legally valid theory. Until the Supreme Court provides further direction via *People v. Aledamat,* we rely on the standard harmless error test, i.e., "whether it is clear beyond a reasonable doubt that [the] jury would have rendered the same verdict absent the error" (*People v. Merritt* (2017) 2 Cal.5th 819, 824, 831). (*Stutelberg, supra*, 29 Cal.App.5th at p. 320 ["Absent further guidance from the Supreme Court, we believe the traditional 'harmless beyond a reasonable doubt' framework is the proper standard to apply"].)

457.) A knife is capable of being used in a dangerous or deadly manner when it is capable of causing great bodily injury or death. (*People v. McCoy*, *supra*, 25 Cal.2d at pp. 188-189; see also *People v. Cloninger* (1958) 165 Cal.App.2d 86, 88.)

Defendant's trial counsel conceded that defendant could have been found guilty of carrying a concealed weapon, if the crime had been charged. (§ 21310; see *In re George W.* (1998) 68 Cal.App.4th 1208, 1212-1215.) Thus, the record includes defendant's concession that the knife was a weapon capable of stabbing a victim. (§§ 16470, 21310.)

Bougie testified that he was "fairly close" to defendant and the knife when defendant initially produced the knife. The security guard testified that defendant was "within just a few inches of striking them with the knife." Both Bougie and Herrera "backed up" when defendant produced the knife, which indicates they were initially within, or close to, striking distance.

A photograph of the knife next to a ruler reflects the total length of the knife is approximately 5.75 inches, with a 2.25-inch blade. The point of the knife blade is sharp, rather than rounded. Because the point of the knife is sharp, the knife could be used to stab or slash a person. Accordingly, the evidence reflects the knife could be used to inflict great bodily injury and Bougie and Herrera were within, or close to, striking distance when defendant produced the knife. Therefore, the evidence supports a finding that the knife was capable of causing great bodily injury.

In regard to intent to use the knife as a weapon, the evidence reflects defendant removed the knife from his pocket after being accused of shoplifting. Upon removing

the knife from his pocket, defendant "wav[ed] the knife around saying, 'See. I got a fucking knife. What are you going to do? I'll show the fucking knife to the camera. See.' And [defendant] made a point to really show the knife to the camera." Defendant also waved the knife at Herrera and Bougie. Defendant's actions and words indicate hostility, and, in turn, defendant's intent to use the knife in a hostile and menacing manner.

In sum, (1) defense counsel conceded the knife was a weapon; (2) the evidence supports a finding that the knife was capable of inflicting great bodily injury; and (3) the evidence supports a finding that defendant intended to use the knife as a weapon. Therefore, we conclude beyond a reasonable doubt that the jury would have found the knife was a deadly or dangerous weapon absent the error. (See generally *People v. Merritt*, *supra*, 2 Cal.5th 819 at p. 831 ["whether it is clear beyond a reasonable doubt that [the] jury would have rendered the same verdict absent the error"].) The trial court's error was harmless. (*Ibid*. [failure to instruct on multiple elements was harmless].)

Defendant contends the error was prejudicial because there was evidence that defendant did not lunge at, swipe at, or point the knife at Bougie and Herrera. Defendant contends that because the jury could have found he only waved the knife in the air, the jury could have reasonably concluded the knife was not a deadly or dangerous weapon.

We agree that, when looking at the evidence in the light most favorable to defendant, it could be concluded that defendant may not have lunged at, swiped at, or

pointed the knife directly at Bougie and Herrera. However, lunging, swiping, and pointing the knife are not required. A knife can cause great bodily injury by stabbing or slashing. Therefore, a knife does not fail to be a weapon because it is not pointed directly at an alleged victim. (See *People v. Raviart* (2001) 93 Cal.App.4th 258, 263 ["it is not necessary to actually point the gun directly at the other person to commit the crime" of assault].) Defendant could have harmed Bougie or Herrera by bringing the knife down in slashing manner across one of their throats. Therefore, we find defendant's argument to be unpersuasive.

DISPOSITION

The judgment is affirmed.

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MILLER
J.

We concur:

McKINSTER
Acting P. J.

RAPHAEL
J.